IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.181 OF 2006

WITH

CIVIL APPLICATION NO.248 OF 2006

Mr.Mukhtar ...Appellant

Versus

Kandathti Chacko Williams & Anr. ...Respondents

.....

Mr.A.R.Shaikh for Appellant.

Mr.Anil Singh i/b Mr.D.R.Shah for Respondent No.1.

.....

CORAM: A.M.KHANWILKAR, J.

MARCH 17, 2006.

P.C.

1. Heard Counsel for the contesting parties.

2. Admit. Mr.Singh waives notice for the Respondent No.1/original Plaintiff, who is the contesting Respondent in the present proceedings. Notice to Respondent No.2 is dispensed with by consent.

3. As short question is involved, Appeal is taken up for hearing forthwith, by consent.

4. This Appeal from Order takes exception to the order passed by the City Civil Court, Mumbai dated 13th February 2006 below Contempt Notice of Motion No.3308 of 2004 in S.C.Suit No.978 of 2000. This Appeal is filed by original Defendant No.2 only.

5. The Respondent No.1 took out the above said contempt Notice of Motion to initiate action of contempt against the Defendants. The same has been allowed by the impugned Judgment and Order in the following terms :

> "1) Contempt Notice of Motion No.3308/04 is made absolute against the defendant Masuk Ali Khan and Mr.Mukhtar in terms of prayer clause (a) and (b) under Order 39 Rule 2-A of the C.P.C.
>
> 2) The notice of motion is dismissed against Mr.Keluskar Contemnor No.3.
>
> 3) Defendant Nos.1 and 2 are ordered to undergo civil imprisonment for a term of one month.

> 4) The plaintiff is directed to pay the necessary charge in the office of the Registrar within one week from today.
>
> 5) The defendants shall pay costs of Rs.1,000/- each to the plaintiff as costs of this Notice of Motion.
>
> 6) By this order the Notice of Motion No.3308/04 stands disposed off."

6. This common order is passed against both the Defendants on the finding reached by the Trial Court that inspite of notice served on the Defendants, fresh construction activity was in progress on the site which was in utter disregard of the injunction order granted by the Court.

7. Insofar as the Appellant/Defendant No.2 is concerned, the Court has held him guilty mainly because no reply was filed on his behalf. Before this Court, the stand taken on behalf of the Appellant is that the written statement was already filed on record on behalf of the Appellant/Defendant No.2. The Appellant was advised that the contents of the written statement were sufficient to counter the allegations in the

Contempt Petition against the Defendant No.2. It is on the basis of such legal advise, the Appellant/Defendant No.2 did not file any formal reply to the contempt Notice of Motion. There is no reason to doubt the correctness of this submission canvassed on behalf of the Appellant. In other words, the Appellant was ill-advised by Advocate in not filing the reply affidavit to the contempt Notice of Motion. Essentially because of this default, the Trial Court has proceeded to hold even the Appellant/Defendant No.2 guilty of the alleged contempt charge.

8. It is well settled that on account of mistake of the Advocate, the litigant should not suffer. More so, in the present case, because the action is of having committed contempt which would entail in serious consequences to the Appellant/Defendant No.2 to undergo civil imprisonment for one month as directed by the Trial Court. In such a situation, in the interest of justice, by way of indulgence, Appellant can be given one opportunity to pursue his case before the Trial Court on merits. For this limited purpose,

this Appeal succeeds by setting aside the order passed by the Trial Court making Notice of Motion absolute in terms of prayer clause (a) "insofar as Appellant/Defendant No.2 is concerned". No other order is interfered with in this Appeal. This indulgence is shown, on condition that the Appellant shall pay cost to the Respondent No.1 quantified at Rs.5,000/- (Rupees Five Thousand) to be paid within two weeks from today as condition precedent, failing which, the indulgence shown in this Appeal will stand recalled and instead, the impugned order will get revived in its entirety even against the Appellant/Defendant No.2.

9. It will be open to the Appellant to take such action as may be advised against the Advocate on whose advise, the Appellant did not file reply to the contempt Notice of Motion, which proceeding will have to be decided on its own merits.

10. The Notice of Motion is restored to the file of the Trial Court, to consider prayer clause (a) "insofar as Defendant No.2/Appellant herein only". The parties shall appear before the Trial

Court on 29th March 2006 to facilitate the Trial Court to pass necessary directions regarding completing of pleadings, so that, the Notice of Motion can proceed for hearing in accordance with law, to the above limited extent.

11. Appeal from Order and the cognate Civil Application are disposed of on the above terms.

A.M.KHANWILKAR, J.